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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944.

No. 753

JULIUS H. MINER, as Judge of the Circuit Court of Cook County, and PAUL WILLER PETERSEN,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel., BENEFIT ASSOCIATION OF RAILWAY EMPLOYEES, a mutual insurance corporation, organized and existing under and by virtue of the laws of the State of Illinois, EARL T. DeMOE, ARTHUR J. LINDSLEY, JAMES M. STREET, FRED B. AHARA, ANDREW BLOOMFIELD, W. H. FUNKE, LEE F. WARD and PAUL E. KELLER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Julius H. Miner, as Judge of the Circuit Court of Cook County, Illinois, and Paul Willer Petersen, respectfully show:

A.

Summary Statement of the Matter Involved.

This is an original action of mandamus brought in the Supreme Court of Illinois by the respondents here, seeking the issuance of an original writ of mandamus direct-

ing petitioner here, Paul Willer Petersen, to dismiss, with prejudice, an action instituted by him against the respondents, in the Circuit Court of Cook County, Illinois, and directing petitioner Julius H. Miner, as Judge of the Circuit Court of Cook County, Illinois, to (a) expunge orders, entered in the action brought by petitioner Petersen, which required the corporate respondent and certain of the individual respondents to file a sworn list of documents, books, accounts, letters and other papers which are or had been in its or their respective possession and material to the merits of the matter in question in said cause; (b) expunge an order which overruled and denied respondents' motion to dismiss, for want of jurisdiction, the suit of petitioner Petersen and expunge all subsequent orders entered by him, and (c) enter an order in said cause sustaining respondents' motion to dismiss said suit for want of jurisdiction, and enter judgment thereon that said cause be dismissed, for want of jurisdiction (Rec. 40).

Petitioner Petersen had previously (Rec. 10-16) filed an action, on behalf of himself and all other members of the Benefit Association of Railway Employees, a mutual insurance company, and on behalf of holders of insurance policies and certificates issued by that company, seeking:

(a) The removal of the individual respondents as officers and directors of that company, that such offices and directorships be declared vacant, the ordering of a new election to fill such vacancies and the direction that the individual respondents be declared ineligible for re-election thereto (Rec. 15);

(b) That the individual respondents be required to render a true and full account to that company of all company funds by them wrongfully disbursed and distributed and to restore and repay the same to the company (Rec. 15).

The allegations of Petersen's complaint, under which such relief was sought, were that on April 24, 1927, the company had entered into an agreement with respondent, Arthur J. Lindsley, whereby the company agreed to pay him, for a period of ten years thereafter, twenty per cent of the net premiums paid to the company, the said Lindsley to bear all expenses of securing business and of commissions to agents and to pay the compensation of the company's President, First Vice President and Second Vice President, which agreement further provided that the said Lindsley was, thereafter, to be the exclusive agent of the company in and for the procurement of policy holders (Rec. 11).

It was further alleged that the said Lindsley was, at the time of the making of the contract, the nominee of a co-partnership for whose benefit the agreement was entered into by him, which co-partnership consisted of himself and certain other individual respondents (Rec. 11). The complaint further stated that, on November 23, 1935, the contract was modified by extending it to November 23, 1955 (Rec. 11); that at the time of such extension certain of the designated individual respondents, who were then co-partners with the said Arthur J. Lindsley in such agency contract, were also officers of the company (Rec. 11, 12).

It was further alleged that although such contract was, on July 2, 1938, further amended by changing the name of the contracting party from Arthur J. Lindsley to Lindsley Agency, and by eliminating the provision designating such agency as the exclusive agent of the company, nevertheless some of the individual respondents, as co-partners, continued to be the sole and exclusive agents of the company (Rec. 12).

It was further alleged that the agreement of April 24, 1927, and the modifications and amendments thereto of November 23, 1935, and July 2, 1938, were illegal and void under the statutes of the State of Illinois (Rec. 12).

It was further alleged that certain of the individual respondents, in addition to being co-partners in the agency, were directors of the company at the time of the filing of the suit and for many years prior thereto, and that other of the individual respondents were also officers of the company; that, as such officers, the compensation of Mr. O'Hara, Mr. Ward, Mr. Lindsley, Mr. Bloomfield and Mr. Street had at all times, from 1927 to and including 1942, exceeded $200.00 per month (Rec. 12, 13).

The complaint further alleged that the company, since its inception, had never returned or paid a dividend to its policy holders and that the directors had, by the device of donations to various clubs and lodges of an associate Order of Benefit Association of Railway Employees, made rebates of premiums to certain policy holders in violation of their duty to charge and assess all members and policyholders of each class equally (Rec. 13).

It was further alleged that the company had filed a false and fraudulent report with the Director of Insurance of the State of Illinois for the year 1941, stating that no person while an officer, director or trustee received compensation on business transactions of the company, directly or indirectly, when in truth and fact certain respondents, who were officers of the company, had participated in the twenty per cent commission paid by the company to the agency (Rec. 13).

It was further alleged that no partner in or member of the agency, on or subsequent to January 1, 1934, had been licensed or authorized to act as, or conduct an insurance agency by the State of Illinois and that all sums paid to the agency and its partners as commissions, pursuant to such contract, were illegally paid in violation of the statutes of the State of Illinois (Rec. 13, 14); that all such payments were, in addition, unconscionable for the benefits received by the company therefor (Rec. 14) and that the company had wrongfully paid to the individual respondents under such agency contract, in the following years, the following sums (Rec. 14):

1934—$466,118.35
1935—$504,653.45
1936—$564,792.82
1937—$648,834.98
1938—$668,121.57
1939—$739,439.30
1940—$880,879.62
1941—$982,591.30

It was further alleged that the amount paid in 1942 was unknown to petitioner Petersen but within the knowledge of respondents; that the so-called agency had utilized the company's offices and clerical help without payment to the company therefor (Rec. 14) and that a demand had been made by petitioner Petersen upon the directors of the company to institute a suit on behalf of the company to require the individual respondents to pay over and return to the company the funds so disbursed by or received by them, which demand had been refused (Rec. 15, 16).

Thereafter, petitioner Petersen moved for an order upon certain respondents to show cause why they should

not produce, for inspection and copying, all agreements between them and other respondents pertaining to the division of moneys received by them from the corporation and for an order upon the corporation and certain individual respondents to file a sworn list of all documents, books, accounts, letters and other papers then or previously in their possession and an order to that effect was entered over the objection of such respondents Rec. 25, 26).

Thereafter respondents filed a motion to dismiss the complaint on the ground that the Court had no jurisdiction to entertain the suit but that such suit could be maintained only by the Director of Insurance represented by the Attorney General, pursuant to the provisions of 1943 Ill. Rev. Stat., Chap. 73, par. 813 (Rec. 27).

That motion of respondents being overruled (Rec. 28, 29), the respondents filed answer to the complaint, again raising the defense that the Court had no jurisdiction to entertain the suit upon the application of petitioner Petersen, and, in general, denying, without setting forth any facts, the allegations of petitioner Petersen's complaint (Rec. 31-33).

Thereafter the respondents filed their original action of mandamus in the Supreme Court of Illinois seeking the relief heretofore stated (Rec. 3-43).

The Supreme Court of Illinois first filed an opinion denying respondents' petition for the writ of mandamus (Rec. 75-82). A petition for rehearing was filed by respondents (Rec. 83-88), answer thereto was filed by the petitioners (Rec. 88-91) and rehearing was allowed by the Supreme Court of Illinois (Rec. 88). Upon rehearing

a new opinion was filed awarding the writ of mandamus (Rec. 91-98) and petitioners in apt time filed a petition for rehearing (Rec. 103-116), and rehearing was denied on September 18, 1944 (Rec. 117).

Petitioners, in their answer to respondents' petition for rehearing, filed after the entry of the first opinion of the Supreme Court of Illinois, stated:

> "To issue the writ of mandamus would deprive Petersen of his right and remedy in contravention of the Fourteenth Amendment, while the refusal to issue the writ could not deprive these directors of due process of law" (Rec. 91).

It was further stated therein, that the granting of a writ of mandamus would deprive the stockholders of the corporation of their only remedy for enforcement of the corporate right to an accounting from these directors, leaving no opportunity to protect it, for the directors themselves would not act (Rec. 89).

In the petition for rehearing filed by the petitioners, after the second opinion of the Supreme Court of Illinois, petitioners stated, in substance, that the Supreme Court of Illinois by finding, as a *matter of fact,* that petitioner Petersen's suit would interfere with the prosecution of the business of the insurance company, had foreclosed him, without a hearing and denied him the opportunity to present evidence disclosing that the successful prosecution of his action would not interfere with the prosecution of the company's business, and that such factual finding deprived him of property without due process of law, citing *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673 (Rec. 113, 114, 116).

The only reference, in either opinion of the Supreme Court of Illinois, to the federal question so presented is the statement that:

> "Petersen *may* (italics ours) have his remedy by application to the Director of Insurance, requesting the bringing of such a suit, or correction of the evil he says exists. It cannot be presumed that the Director, upon proper showing, would refuse to take such action as may be required to remedy the situation. If he should refuse so to act, review of his decision can be had under Section 407 of the Insurance Code. In *American Surety Company* v. *Jones,* 384 Ill. 222, it was held, citing *People ex rel. Gosling* v. *Potts,* 264 Ill. 522, that mandamus will lie to compel the Director of Insurance to do his duty under the statute" (Rec. 98).

B.

Jurisdictional Statement.

Jurisdiction is conferred upon this Court by Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 344 (b)). The judgment of the Supreme Court of Illinois, which is sought to be reviewed, was filed May 16, 1944, and petitioners' petition for rehearing was denied September 18, 1944. This petition is filed within three months thereafter, as prescribed by the Act of February 13, 1925, Ch. 229, Sec. 8, 43 Statutes 940 (28 U. S. C. Sec. 350) and *The Department of Banking, State of Nebr.* v. *Pink,* 317 U. S. 264, 266.

C.

Questions Presented.

1. Whether it is not a violation of the Fourteenth Amendment to the Constitution of the United States for

a Supreme Court of a state, in an action in which no factual issues are involved and in which the Court has no means of determining factual issues, to deprive a corporation and its members of their sole remedy to require the accounting of and return to the corporation of moneys illegally and unconscionably misappropriated to their own use by its officers and directors when such deprivation is made upon an assumption, by that Court, of facts not disclosed by the record before it and upon which assumptions no evidence was offered nor an opportunity therefor afforded.

2. Whether it is not a deprivation of property without due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, for a state Supreme Court to determine, *as a matter of law*, that a derivative action, for the benefit of an insurance corporation against its officers and directors, for the misappropriation of corporate funds constitutes, *as a matter of fact*, an interference "with the prosecution of the business" of the company which would thereby bar the action under a state statute.

3. Whether the holding applicable, by a state Supreme Court, of a state statute, enacted for the rehabilitation, liquidation, conservation and dissolution of insurance companies, and which prohibits (except in a suit by the Director of Insurance) the entry of an "order, judgment or decree enjoining, restraining or interfering with the *prosecution of the business*" (italics ours) of an insurance company, to an action on behalf of the company for an accounting from its officers and directors, thereby prohibiting such action, does not deprive the company and its members of property without due process of law.

D.

Reasons Relied on for Allowance of Writ.

The insurance company, here involved, has 309,715 persons, exclusive of their wives, children and other family members, insured of which only 34,209 are residents of the State of Illinois (Rec. 8), which is the state of the company's incorporation and the state of residence of its officers and directors as well as of petitioner Petersen. The company is licensed to do business in forty-two states, and the District of Columbia (Rec. 5).

The practice of the respondents here is one followed by many mutual insurance companies, large and small, throughout the United States, as the method adopted by the promoters of the company to enable them to withdraw profits. This practice results in the members being deprived of the benefit of lower premium rates without there being any corresponding substantial benefit to the company and its members for the large sums withdrawn under the guise of "overriding commissions" or "for supervision of agents."

Not only are the questions here presented substantial, but they are, also, of first impression. Although in similar cases two state Insurance Directors have refused to renew the licenses of insurance companies which paid their officers and directors unconscionable sums, there has been, we believe, no case yet reported where the restoration of those funds to the company has been sought on that basis. By its decision the Supreme Court of Illinois has, without due process of law, deprived the corporation and its members of their property rights, viz.: their chose in action against the officers and directors, and its decision is not in accord with applicable decisions of this honorable Court.

E.

Prayer.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this honorable Court directed to the Supreme Court of the State of Illinois, to the end that the judgment of the Supreme Court of Illinois may be reviewed and reversed by this honorable Court.

JULIUS H. MINER,
as Judge of the Circuit Court of Cook County, Illinois, and
PAUL WILLER PETERSEN

By: CHARLES AARON,
Counsel for Petitioners.

CHARLES W. STIEFEL, JR.,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The second opinion of the Supreme Court of Illinois is reported in the advance sheets at 387 Ill. 393 and is printed in full in the record (Rec. 91-98). The first opinion of the Supreme Court of Illinois also appears in full in the record (Rec. 75-82).

II.

Statement of the Case.

The material facts with reference to the origin and history of the case, the grounds on which the jurisdiction of this Court is invoked and the issues and questions presented have been stated in the preceding petition.

III.

Specification of Errors to Be Urged.

1. The Supreme Court of Illinois erred in awarding the writ of mandamus.

2. The Supreme Court of Illinois erred in not denying the writ of mandamus.

3. The Supreme Court of Illinois erred in holding that petitioner Petersen's action was within the purview of Section 201 of the Insurance Code (1943 Illinois Rev. Stats. Chap. 73, par. 813).

4. The Supreme Court of Illinois erred in not holding that Section 201 of the Illinois Insurance Code (1943 Illinois Rev. Stats. Chap. 73, par. 813) did not apply to petitioner Petersen's suit.

5. The Supreme Court of Illinois erred in failing to hold that to award the writ of mandamus would deprive the corporation of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

IV.

ARGUMENT.

A.

Petitioner and the corporation on whose behalf he instituted his suit, have been denied due process of law, in its primary sense, of their opportunity to present their case.

The right to sue is a property right *Angle* v. *Chicago M. & St. P. R. Co.,* 151 U. S. 1.

The right, in equity, of shareholders of a corporation to sue on behalf of, and for the benefit of the corporation, where the officers and directors themselves refuse to act, or are themselves the party at fault, has been long established. *Bruschke* v. *Der Nord Chicago Schuetzen Verein,* 145 Ill. 433; *United Copper Co.* v. *Amalgamated Copper Co.,* 244 U. S. 261; *Delaware & Hudson Co.* v. *Albany & Susquehanna R. R. Co.,* 213 U. S. 435; *Chicago* v. *Mills,* 204 U. S. 321; *Dodge* v. *Woolsey,* 18 How. 331.

The suit instituted by petitioner Petersen was of that character, seeking as it did an accounting to the corporation by its officers and directors and the restoration to it of the funds wrongfully withdrawn from it. The bases of petitioner's claim that the acts of the directors and officers (individual respondents here) were wrongful, were:

(a) That the contract between the company and its officers and directors was illegal and void under the statute of Illinois, in effect at the time it was entered into and at the time it was extended, which provides, in substance, that no insurance company shall agree to pay its officers, trustees or salaried employees any salary or other compensation, directly or indirectly, for more than

three years and no officer, director or trustee, who is paid a salary for his services of more than $200.00 per month, shall receive any other compensation directly or indirectly. (1935 Ill. Rev. Stats. Chap. 73, par. 382 (originally enacted 1907)).

(b) That the payments made by the company to officers and directors were illegal because such payments were in violation of the statute of the State of Illinois which provides, in substance, that no person shall act as an insurance agent without a license and that moneys may be paid for the solicitation or negotiation of insurance contracts only to licensed persons. (1935 Ill. Rev. Stats. Chap. 73, par. 564). The recipients of the payments here were not licensed by the State of Illinois, nor was the agency in which they were partners.

(c) That even if such payments were legally made, the amounts paid were unconscionable in view of the lack of benefits received therefor by the company, particularly as all the agency's requirements of quarters and office help were furnished, without charge, by the company.

To that complaint respondents filed a motion to dismiss and their petition for mandamus was directed to obtaining the expunging of the order of petitioner Miner overruling that motion.

The record, as presented to the Supreme Court of Illinois in the mandamus hearing, consisted of petitioner Petersen's complaint, the motion and order for the production and inspection of books and records and the motion to dismiss the complaint. The petition for mandamus (Rec. 4-9, 34-39) made numerous allegations of fact which were denied by respondent Petersen's answer to the petition for mandamus (Rec. 51-54). The Supreme

Court of Illinois, admittedly, has no means for trying issues of fact, nor were any presented to it (Rec. 72-74, 81) and, as a result, the issues in the mandamus action were treated as closed upon respondents' motion to treat petitioner Petersen's answer to the petition for mandamus, as a demurrer and upon the respondents' special demurrer to petitioner Miner's answer (Rec. 69) which answer stated that he had no knowledge of the facts alleged in the petition for mandamus as the same had never been presented to him (Rec. 47-49).

In this state of the record, the allegations contained in the original complaint of petitioner must be deemed true.

The only ground of respondents' motion to dismiss and the ground upon which they sought a writ of mandamus was that petitioner Petersen's suit came within the purview of Section 201 of the Illinois Insurance Code (1943 Ill. Rev. Stats., Chap. 73, par. 813), the relevant portions of which provide:

> "No order, judgment or decree enjoining, restraining or interfering with the prosecution of the business of any company, or for the appointment of a temporary or permanent receiver, rehabilitator or liquidator of a domestic company, or receiver or conservator of a foreign or alien company, shall be made or granted otherwise than upon the petition of the Director (of Insurance) represented by the Attorney General as provided in this article."

That section of the Insurance Code has always been, since its enactment, a part of Article XIII of the Insurance Code providing for the "rehabilitation, liquidation, conservation and dissolution of companies" (1943 Ill. Rev. Stats. Chap. 73, page 1871).

The Supreme Court of Illinois, in its first opinion held that whether or not petitioner Petersen's suit could constitute an interference with the prosecution of the company's business was a mixed question of fact and law which could not be determined by it but only by the trial court (Rec. 81).

In its second opinion, of which review is here sought, the state Court concluded, without any basis in the record before it, that as *a matter of fact* such suit would constitute an interference with the company's "business"; and, in so doing, ignored the very wording of the statute, itself, prohibiting an order interfering with the "prosecution of the (company's) business," and then assumed the fact that petitioner Petersen's suit did so interfere. His suit would interfere, said the state Court, because if Petersen were successful, the election of new directors would be required which would necessitate the sending out of notice of a meeting to hold such election and, also, the company would be required to employ new agents.

It is, to say the least, obscure, how the sending of a notice of a special meeting for the election of directors could any more interfere with the prosecution of the company's business than could the sending of notice for an annual meeting to be held for that purpose, or the sending of no notice at all.

Prior to the adoption, in 1937, of the Insurance Code, the Illinois statutes provided, (1935 Ill. Rev. Stats. Chap. 73, par. 105 (8 (a))) "No order, judgment or decree providing for an *accounting* or enjoining, restraining or interfering with the prosecution of the business of any domestic insurance corporation" shall be made otherwise than upon petition, etc. Upon the adoption of the In-

surance Code, the language "providing for an accounting" was omitted and it therefore must be presumed that it was the intent of the Illinois Legislature to permit private citizens thereafter to maintain an action for an accounting *against* insurance companies. There never has been a statutory prohibition against a suit for an accounting brought *by* an insurance company or on its behalf.

The state Supreme Court disposed of this contention on the theory that the reason for the statutory change was to enable an insurance agent to obtain an accounting of commissions due him. Such an intent, on the part of the Legislature, would have been expressed by the addition of a proviso, excepting from prohibited accounting actions suits for commissions, not by the elimination from the prohibition, of all suits for accounting.

The finding of fact that if relief were granted in Petersen's suit the company would be required to procure other agents to conduct its business, in lieu of the individual respondents here, is solely unsupported by any evidence and, in fact, wholly ignores the allegation in petitioner Petersen's complaint, which must be taken as true, that the respondents are not the agents of the company having never been licensed so to act and therefore their removal could not require the procurement of new agents.

Likewise, it was ignored that Section 201 of the Insurance Code does not prohibit the *maintenance* of a suit, but only the entry of a judgment, order or decree therein, of the nature prohibited, and that a decree might have been entered in Petersen's action finding that, although the acts of the individual respondents here were not

illegal, the sums withdrawn were unconscionable and should be restored, but, not being illegal, the individual respondents should not be removed from office nor new elections presently held.

Petitioners contend that in awarding the writ of mandamus the Supreme Court of Illinois erred in holding applicable to petitioner Petersen's suit, which was for the benefit of the company, a statute which, by its very terms, applies only to actions *against* an insurance company. There can be no question that if a writ of mandamus had been awarded to prohibit a suit brought by the company, at the behest of a board of directors which succeeded the individual respondents here, it would have been a deprivation of property without due process of law, within the Fourteenth Amendment. There is no difference in law between petitioner Petersen's derivative action and an action by the corporation itself.

In any event, the award of the writ of mandamus based upon assumptions of facts not before the Court, and upon which petitioner Petersen was denied the opportunity to present evidence, is a deprivation of property, without due process of law, within the Fourteenth Amendment, in the primary sense that he and the corporation on whose behalf he sued, have been deprived of all remedies to enforce a right, with no real opportunity to protect it. *Ohio Bell Telephone Co.* v. *Public Utilities Comm.*, 301 U. S. 292, 304; *Georgia Ry. & El. Co.* v. *Decatur*, 295 U. S. 165; *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673; *Saunders* v. *Shaw*, 244 U. S. 317.

This Court will review and correct errors of fact of a state Supreme Court in assuming a state of facts, without any support in the record, as a basis for denying asserted federal rights. *Postal Telegraph Co.* v. *City of Newport, Ky.*, 247 U. S. 464.

In the mandamus proceeding, all of the allegations of respondents, here, that petitioner Petersen's suit would constitute an interference with the prosecution of the company's business were denied by Petersen; such denials must be taken as true where the case was disposed of on pleadings. *Postal Telegraph Co.* v. *City of Newport, Ky.,* 247 U. S. 464.

This Court will examine the entire record to determine whether, what purports to be a finding upon questions of fact, is so involved with and dependent upon questions of law as to be in substance and effect a decision of the law. *United Gas Public Service Co.* v. *Texas,* 303 U. S. 123; *Kansas City Southern Ry. Co.* v. *Albers Commission Co.,* 223 U. S. 573; *U. S.* v. *Pink,* 315 U. S. 203.

The state Supreme Court awarded the writ of mandamus upon the arbitrary presumption that any decree which might be rendered in Petersen's suit, would interfere with the prosecution of the business of the insurance company and petitioner Petersen was afforded no opportunity to repel that presumption; statutes which created such arbitrary presumptions and deprived a litigant of an opportunity to repel them, have been held violative of the due process clause of the Fourteenth Amendment. *Western & Atl. R. R. Co.* v. *Henderson,* 279 U. S. 639; *Manley* v. *Georgia,* 279 U. S. 1; *Bailey* v. *Alabama,* 219 U. S. 219. Likewise, a deprivation of all remedy will constitute such a violation. *Coombes* v. *Getz,* 285 U. S. 434; *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 431.

The rights granted by the Fourteenth Amendment may be violated by judicial decree as well as by legislation as its provisions are addressed to every person, natural or

juridical, who is the repository of state power. *Saunders* v. *Shaw*, 244 U. S. 317; *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278; *Scott* v. *McNeal*, 154 U. S. 34.

The judgment of a state Supreme Court, in a proceeding for mandamus, is subject to review under the same conditions as any other judgment. *Detroit, etc. Ry.* v. *Mich. Ry. Comm.*, 240 U. S. 564; *American Express Co.* v. *Michigan*, 177 U. S. 404; *McPherson* v. *Blacker*, 146 U. S. 1; *Hartman* v. *Greenhow*, 102 U. S. 672.

When a judgment of a State Court is challenged, as it is here, as being violative of the due process clause, it becomes the duty of this Court to examine the course of procedure to ascertain whether the litigant, whose rights have been adjudicated, has been afforded the opportunity to be heard as is requisite to the due process which the Constitution prescribes. *Hansberry* v. *Lee*, 311 U. S. 32; *Grannis* v. *Ordean*, 234 U. S. 385.

B.

The Federal Question Was Raised By Petitioners in Apt Time.

In two prior cases the Supreme Court of Illinois had so construed Section 201 of the Insurance Code (1943 Ill. Rev. Stats. Chap. 73, par. 813) as to permit even suits *against* an insurance company by one of its members for redress of internal wrongs, so long as the result of such suit did not prohibit the carrying on of its business, by the company *Dale* v. *Hancock County Mutual Life Association*, 363 Ill. 222; *Bastian* v. *Modern Woodmen of America*, 166 Ill. 595. Those two cases were the only prior decisions of the Supreme Court of Illinois construing that section of the Insurance Code.

In the former case, the Supreme Court of Illinois held that an injunction, granted at the suit of a member of the association, restraining the company from changing from a mutual benefit society to a legal reserve basis, did not fall within the prohibition of that section. In the latter case, the same Court held that an injunction, granted at the suit of a member of the association, restraining the association from moving its principal office from one county to another, was not barred by that section. The injunctions granted in those cases incontrovertibly interfered with the prosecution of the business of the insurance company to a far greater extent than could a decree requiring the sending of a notice of a special meeting for the election of directors.

The state Supreme Court attempted to distinguish those previous decisions on the ground that they concerned only violations, by the officers and directors of the companies there involved, of the companies' articles of association, constitutions or by-laws, while in the instant case the violations charged were of statutory prohibitions. Such a distinction is wholly erroneous upon two grounds. First, the state court did not, in the case of *Bastian* v. *Modern Woodmen of America*, 166 Ill. 595, limit its elimination, from the prohibition contained in Section 201, to suits based upon violation of contract between the association and its members, but included therein (page 608) suits based upon violation of *fundamental laws*. Secondly, it would indeed be anomalous to permit the maintenance, by individual members, of suits, the result of which would constitute an interference with the prosecution of the company's business, where the bases of such suits were violations, by the directors, of the company's by-laws or articles of association but to prohibit such suits where the violations by the directors

and officers were of the statutes of the state itself and the fundamental law of common honesty.

Although such two previous decisions of the Illinois Supreme Court involved insurance companies, in the instant case that Court holds the prohibition of Section 201 applicable, because the company involved is an insurance company. In its first opinion, the state Court stated that petitioner Petersen's action was no different than the derivative action of a stockholder in a general corporation, citing *Atlantic Life Insurance Co.* v. *Moncure,* 35 Fed. 2nd. 360 (Rec. 81). In the second opinion, however, the Court attempted to find a distinction on the ground that an insurance company is engaged in a business charged with the public interest (Rec. 96-98), citing *Swan* v. *Mutual Reserve Fund Life Asso.,* 155 N. Y. 9, 49 N. E. 258, which was a suit by a member against an insurance company for an accounting to the members, not a suit by the company against its officers and directors for an accounting to it.

The basis of this attempted distinction seems to be that an insurance company, in the conduct of its business, is impressed with the public interest and subject to regulation by the state under its police power. The state, however, exercised its police power and, in its exercise, saw fit to prohibit the entry of only those types of order, judgment or decree as are set forth in Section 201 and then only in suits instituted by persons other than the Director of Insurance. The state thereby recognized the distinction between insurance and other companies, as such limitations are not placed upon its courts in suits against companies conducting other than an insurance business. The action of the state Court, in extending by judicial construction the scope of those limitations, in

itself constitutes an exercise of police power, by the Court. In any event, the holding that the nature of the company's business alters the character of Petersen's suit to something different than an ordinary derivative action by a stockholder of a general corporation is, to say the least, a novel one.

In view of such previous construction of that section of the Illinois statutes, it could not have been anticipated that a different construction would be placed upon Section 201, as was done in the second opinion of the Supreme Court of Illinois although not in the first opinion. Under such circumstances the federal question may be raised for the first time on a petition for rehearing. *Herndon* v. *Georgia,* 295 U. S. 441 and cases cited; *Missouri* v. *Gehner,* 281 U. S. 313; *Saunders* v. *Shaw,* 244 U. S. 317.

Actually it was raised by petitioners, in the instant case, prior to the second opinion of the Supreme Court of Illinois, in their answer to respondents' petition for rehearing of the first opinion. Where the state Court ruling is such that it construes the state statute to mean one thing for some cases and another thing for others, as is the case here, an objection to its constitutional validity could not have been made in advance of the event, and if such objection is first made in the petition for rehearing, it is not too late to give this Court jurisdiction. *Great Northern Railway* v. *Sunburst Co.,* 287 U. S. 358. Even if this section had never, previously, been construed by the Supreme Court of Illinois, petitioners would not have been estopped from attacking the decision for the first time upon petition for rehearing, as being prejudicial to petitioners' rights under the federal constitution, if they did not anticipate such a prejudicial construction in the earlier stages of the case but relied

upon another, not unreasonable, construction, which they had invoked in their own behalf. *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657.

Whether the federal question was raised in the state Court, is itself a federal question which this Court will determine from an examination of the record, *Schuylkill Trust Co.* v. *Penna.*, 296 U. S. 113, and to preserve the protection of fundamental rights, this Court will indulge every reasonable presumption against their waiver, *Glasser* v. *U. S.*, 315 U. S. 60; *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389; *Ohio Bell Telephone Co.* v. *Public Utilities Comm.*, 301 U. S. 292.

C.

The Illinois Supreme Court Failed to Determine the Federal Question Presented to It.

The only reference, in the second opinion of the Supreme Court of Illinois, to the federal question presented by petitioners is the statement quoted in the annexed petition that petitioner Petersen "may" have his remedy by application to the Director of Insurance. This statement, in addition to being erroneous as a matter of law, evades and does not determine the question of whether the awarding of the writ of mandamus does not deprive petitioner Petersen and the corporation, by him represented, of their only right of action.

It is well settled that the Constitution of the United States, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even if such claimed constitutional protection be denied on non-federal grounds, it is the province of this Court

to inquire whether the decision of the state Court rests upon a fair and substantial basis. If unsubstantial, constitutional obligations may not be thus avoided. *Lawrence* v. *State Tax Comm.*, 286 U. S. 276; *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine* v. *Michaux*, 279 U. S. 737; *N. Y. Central R. R. Co.* v. *N. Y. & P. Co.*, 271 U. S. 124; *Railroad Comm.* v. *Eastern Texas R. R. Co.*, 264 U. S. 79; *Davis* v. *Wechsler*, 263 U. S. 22; *Ward* v. *Love County*, 253 U. S. 17; *Creswill* v. *Knights of Pythias*, 225 U. S. 246.

That the non-federal ground of the decision of the Supreme Court of Illinois is unsubstantial has been heretofore pointed out. For that Court to say that petitioner "may" have his remedy by application to the Director of Insurance (a) ignores the allegation made by the respondents themselves (Rec. 4) that the association has been under the supervision of the Insurance Department of Illinois since April 24, 1927, and subjected to periodic examinations by it, without the Director of Insurance having seen fit to take action to correct the situation; (b) misstates the law, as petitioner Petersen could not, by legal action, require the Director of Insurance to correct the situation as (1) whether or not to take such action would be a matter within the discretion of the Director and therefore he would not be subject to mandamus (*People* v. *Allman*, 382 Ill. 156), (2) mandamus will not lie where to issue the writ would put into the hands of the Court the control and regulation of the general course of official conduct or enforce the performance of official duties generally (*Liquor Dealers Asso.* v. *Schreiber*, 382 Ill. 454; *Coughlin* v. *Chicago Park Dist.*, 364 Ill. 90; *MacGregor* v. *Miller*, 324 Ill. 113; *People* v. *Busse*, 238 Ill. 393) and (3) as any suit which the Director wished to institute would have to meet with the ap-

proval of the Attorney General, the Director alone could not be charged with the duty of prosecuting such action and therefore mandamus would not lie as approval of a third person would be necessary (*People* v. *Whelan,* 356 Ill. 328; *MacGregor* v. *Miller,* 324 Ill. 113; *People ex rel. Schoonover* v. *McLaughlin,* 278 Ill. App. 197).

The cases cited by the Supreme Court to support the statement that petitioner Petersen "may have his remedy by application to the Director of Insurance" do not determine that such remedy in fact exists. The case of *American Surety Co.* v. *Jones,* 384 Ill. 222, did not involve a mandamus action nor was it there held that there could be a review of a decision of the Director to take no action, but in that case it was held merely that competitors were not aggrieved parties within the meaning of the Insurance Code and, not being aggrieved parties, were not entitled to a judicial review of an order of the Director of Insurance. The case of *People* v. *Potts,* 264 Ill. 522, clearly distinguishes the issues in that case from one in which the writ of mandamus would require an official to exercise a duty in a particular way.

Under the Insurance Code of Illinois, Section 188 (1943 Ill. Rev. Stats. Chap. 73, par. 800), the Director of Insurance may, under the conditions prescribed therein, request the Attorney General to apply for a rule upon a company to show cause why it should not be liquidated or rehabilitated or for such other relief as the nature of the case and the interest of its policyholders, creditors, members, stockholders or the public may require. That section of the Insurance Code prescribes the grounds upon which the Director of Insurance may request the Attorney General to act. The causing, by its officers and directors, of an insurance company to pay

to such officers and directors unconscionable sums for the performance of no services other than they are required to perform in the course of their regular duties, is not one of the grounds provided by the statute, upon which the Director of Insurance may take action. The Director could, therefore, resist any attempt, based upon such a condition, to mandamus him to take action. In two other states, Directors of Insurance have seen fit, on their own initiative, to refuse to renew the license of insurance companies where such condition existed. *State ex rel. Celina Mutual Casualty Co.* v. *Conn.,* 115 Oh. St. 607, 155 N. E. 138, 50 A. L. R. 473; 117 Oh. St. 190, 157 N. E. 563, appeal dismissed 276 U. S. 596; *Caminetti* v. *State Ins. Co.,* 126 Pac. 2nd. 165, 52 Cal. App. 2nd. 321; *Caminetti* v. *National Guaranty Life,* 126 Pac. 2nd. 170, 52 Cal. App. 2nd. 835; *Caminetti* v. *Guaranty Union Life Ins. Co.,* 126 Pac. 2nd. 159, 52 Cal. App. 2nd. 330, (hearing denied by California Supreme Court).

The respondent insurance company here is solvent and the damage which would be done to its business, if control of it were taken over by the Director of Insurance as by that statute permitted, would be, indeed, great. Only benefit can result to the company if Petersen's suit is successful, while no harm can result if his suit should be unsuccessful.

As there is lacking any method by which the company or petitioner Petersen can require the Director of Insurance to proceed to rectify the wrongs which the officers and directors have committed and are committing, the awarding of the writ of mandamus has deprived the company, as well as Petersen and the other members whom he represents, of all remedies to enforce the liability of the individual respondents to the company.

CONCLUSION.

We respectfully submit that the Supreme Court of Illinois has decided a federal question of substance in a way not in accord with applicable decisions of this Court and without justification in law and we therefore respectfully submit that, in view of the novelty of the questions presented, and their great importance, they are worthy of review by this honorable Court.

Respectfully submitted,

CHARLES AARON,
Counsel for Petitioners.

CHARLES W. STIEFEL, JR.,
Of Counsel.

(20)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 753

JULIUS H. MINER, as Judge of the Circuit Court of Cook County, and PAUL WILLER PETERSEN,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel., BENEFIT ASSOCIATION OF RAILWAY EMPLOYEES, a mutual insurance corporation, organized and existing under and by virtue of the laws of the State of Illinois, EARL T. DEMOE, ARTHUR J. LINDSLEY, JAMES M. STREET, FRED B. AHARA, ANDREW BLOOMFIELD, W. H. FUNKE, LEE F. WARD and PAUL E. KELLER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF OPPOSING CERTIORARI.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF OPPOSING CERTIORARI.

MAY IT PLEASE THE COURT:

I.

Opinion of Court Below.

The opinion of the Supreme Court of Illinois in this case was filed May 16, 1944, appears as *The People, ex rel*

Benefit Association of Railway Employees, et al. v. *Julius H. Miner, Judge, et al., Respondents,* 387 Ill. 393 and is set out in full in the record herein beginning at Pg. 91.

II.

Jurisdictional Grounds.

This is not a case of public importance. It does not involve a federal statute. There is no federal question presented nor was any one raised in apt time. There has been no denial of due process as petitioner Petersen has been heard all the time. This is merely a case where the Illinois Supreme Court followed the plain wording of an Illinois statute (Section 201 of Illinois Insurance Code, *infra* p. 4) and wherein petitioner Petersen has failed to not only exhaust but even pursue a plain administrative remedy provided by Illinois statutes. (Secs. 401, 402, 403, 407 of Illinois Insurance Code, *infra* p. 17.)

III.

Statement of the Case.

This is a petition for a writ of certiorari from a judgment of the Supreme Court of Illinois entered in an original proceeding there and awarding two original writs of *mandamus* to respondents herein. The first writ compels petitioner Miner, a Judge of the Circuit Court of Cook County, Illinois, a trial court of general jurisdiction, to expunge two orders entered by him in a certain case brought by petitioner Petersen against these respondents in said Circuit Court, the first order requiring respondents to file a list of documents therein and the second order overruling respondents' motion to dismiss said suit for want of jurisdiction (R. 99, 100). The first writ

also ordered the said Miner to sustain the motion to dismiss for want of jurisdiction and enter judgment that said cause be dismissed for want of jurisdiction and that Petersen take nothing by his suit and that the defendants therein, being the respondents here, go hence without day, etc. (R. 100). The second writ compels petitioner Petersen to appear in the Circuit Court and move, orally or in writing, to dismiss said suit with prejudice (R. 101, 102).

In the Circuit Court suit, Petersen alleges that he is the holder of a certificate of insurance under a group policy issued by the respondent, Benefit Association of Railway Employees, hereinafter referred to as the Association, and, on behalf of himself and others similarly situated, he seeks to maintain said suit. The statement of petitioners is substantially correct except that it fails to state that the action was brought against the respondent Association as well as its officers and directors. Likewise it fails to mention that the agency contract, which the suit seeks to have declared invalid, is the one by virtue of which the Association acquires all of its business (R. 11). Petitioners' statement also fails to state that out of the sums of money alleged to be received by the individual respondents, and set out so prominently on pg. 5 of the petition, must come "all expenses of securing business and of commissions to agents, and also to pay the compensation of the company's President, First Vice President and Second Vice President" (R. 11).

Thus, not only did Petersen's suit seek to remove the present officers and directors of the Association, not only did it seek to have such offices and directorships declared vacant, not only did it seek the ordering of a new election to fill such vacancies, and not only did it seek the direction that present officers and directors be declared ineligible for re-election, but it also sought to destroy as "wholly illegal

and void under the statutes of the State of Illinois'' (R. 12) the contract under which the Association acquires all of its business.

The sole question presented to the Supreme Court of Illinois, as we develop more fully hereafter, was whether such a suit, upon the facts pleaded in the complaint and admitted in the record, was one ''interfering with the prosecution of the business of any company'' and therefore proscribed by Section 201 of the Illinois Insurance Code (Ill. Rev. Stats. (1941) Chap. 73, Par. 813), except it be instituted ''upon the petition of the director (insurance) represented by the Attorney General''. Upon the facts pleaded in the complaint and admitted in the record, the Supreme Court of Illinois held that Petersen's suit was such an action, that the Circuit Court was without jurisdiction to entertain it because of the statute and that therefore its writs should issue (R. 93, 96, 98).

The pertinent provisions of the Illinois Statute which prohibited the maintenance of Petersen's suit, being Section 201 of the Illinois Insurance Code, were and are as follows (Ill. Rev. Stats. (1943) Chap. 73, Par. 813):

> ''No order, judgment or decree enjoining, restraining or interfering with the prosecution of the business of any company, or for the appointment of a temporary or permanent receiver, rehabilitator or liquidator of a domestic company, or receiver or conservator of a foreign or alien company, shall be made or granted otherwise than upon the petition of the Director (of Insurance) represented by the Attorney General as provided in this article.''

IV.

ARGUMENT.

A.

No federal question is presented nor was one properly raised or in apt time.

We submit that not only is there no substantial federal question here, but also that none was raised properly or in apt time. This was an original proceeding in the Supreme Court of Illinois. In the briefs filed by them in that Court, petitioners here made no claim that the awarding of the writ would deny due process. Their Theory of the Case and their Points and Authorities in said brief contain not even an illusion to a federal question (R. 74-75). The cause was submitted by them upon pure local questions of statutory construction.

The first mention of any federal question came in our petition for rehearing after the first opinion of the Illinois Court (R. 84-88). We specifically raised it and argued it at some length. In their answer to that petition, their only reference to a federal question being asserted by them is the statement "it *could* well be said by respondent Petersen that the granting of a writ of mandamus" would be directly contrary to *Brinkerhoff-Faris* v. *Hill*, 281 U. S. 673 as it would deprive the stockholders of the corporation of their only remedy for an accounting (R. 89). After the rehearing was granted and a new opinion filed awarding the writ, petitioners filed a petition for rehearing. The

three grounds which they assigned as reasons for rehearing are the following (R. 104):

> (a) The controlling issues in this cause remove it entirely from the scope of Section 201 of the Insurance Code as it is not an action against an insurance company but, in reality, an action by an insurance company, and
>
> (b) That even if it be conceded that Petersen's is the type of suit which could fall within the scope of Section 201, the Court was under a misapprehension in concluding that the result of such suit, if favorable to Petersen, would produce an interference with the prosecution of the business of the petitioning insurance company, and
>
> (c) That respondent could obtain relief by application to the Director of Insurance.

Certainly there is no reference to a federal question here.

In the body of that petition for rehearing under their argument that Petersen's suit does not interfere with the prosecution of the business of the Company (R. 109) appears merely a sentence to the effect that a holding that the suit would interfere with the prosecution of the business of the Company "would be to deprive him (Petersen) of property without due process", citing *Brinkerhoff-Faris v. Hill*, 281 U. S. 673 (R. 114). Then follows in the concluding part of that petition for rehearing, the statement that "the determination in this *mandamus* proceeding, from the record before the trial court, that Petersen's suit would, as a *matter of fact*, interfere with the prosecution of that insurance business, deprives respondent Petersen of his day in court and thereby deprives him of property without due process of law" (R. 116). It is upon this record that petitioners claim the federal question was raised in apt time. Not only did the Illinois Court not decide any federal question but it could well ignore any pretended claim raised in this manner under the familiar rule that errors assigned but not argued are deemed

waived. The mere mention of a federal question *arguendo* on a point non-federal certainly should not be deemed to raise a federal question and the mere bald assertion of a denial of due process (R. 116) without a fair and adequate presentation does not compel a court to conduct an independent investigation of its own into the law to determine if it has merit where counsel apparently do not see fit to do so. (*Harding* v. *Illinois*, 196 U. S. 78, 87, 88; *Miles* v. *Caldwell*, 2 Wall. 35, 36; *Duggan* v. *Ryan*, 211 Ill. 133, 137.)

But even if it be assumed that this was sufficient to raise a federal question it came too late upon a petition for rehearing unless the State Court actually entertained the question and decided it. (*Herndon* v. *Georgia*, 295 U. S. 441, 443 and cases cited.) It is clear that the Illinois court did neither (R. 91, *et seq.*). This is admitted by petitioners (Pet. 25).

Petitioners seek to excuse their tardy conduct by claiming to be surprised by a change in state law, and thereby to avail themselves of the exception permitting the federal question to be raised by the petition for rehearing under the *rationale* that it is then being raised at the earliest opportunity (Pet. 24). They ignore the rule that "the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relies, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this Court". (*Brandeis J.*, in *Brinkerhoff-Faris Trust & Savings Bank* v. *Hill*, 281 U. S. 673, 680, note 7 and cases cited.) We by no means infer that there was a change in state law. The opinion of the Illinois court indicates quite clearly, we submit, that the cases upon which petitioners relied were inapplicable (R. 95, 96) while other Illinois cases were controlling (R. 94, 96).

Only one question was presented to the State court and that was the substantial one of whether Petersen's suit was one interfering with the prosecution of the business of an insurance company upon the facts alleged in his complaint in the trial court and which were admitted to be true. He was fully heard on that question by the Illinois Supreme Court. At no time was he deprived of the right to present his case. Any claim of a change in state law could only refer to the question of whether Petersen was right or wrong about the state law and not to a denial of a right to be heard by virtue of the change in the state law as he was being heard fully all the time. It is this very fact that brings this case within the doctrine we have quoted from the *Brinkerhoff-Faris* case and differentiates the case at bar from the facts of that case in that the party there was precluded from his remedy before the State Tax Commission by virtue of the change in state law. As we have indicated, throughout this case Petersen has been heard fully on the question of whether his suit is within the prohibition of the Illinois Statute, and no change in state law has deprived him of such hearing.

B.

Petitioners were not denied due process.

We have heretofore set out the pertinent provisions of the statute prohibiting Petersen's suit (*ante* p. 4). Notwithstanding this statute petitioner Petersen filed a suit in the Circuit Court of Cook County (R. 9) and the trial judge, petitioner Miner, assumed jurisdiction over that suit, overruling respondents' motion to dismiss for want of jurisdiction (R. 27, 29) and entering an order therein requiring respondents to file a list of documents, etc. (R. 25, 26).

Thereupon, respondents moved the Supreme Court of Illinois for leave to file an original petition in *mandamus* (R. 1) seeking to exunge those orders and for writs requiring dismissal of said suit (R. 40, 41) because of lack of jurisdiction in the trial court to entertain it at the instance of one not the Director of Insurance of Illinois (R. 39), quite similar to the procedure followed in *Gibbes* v. *Zimmerman,* 290 U. S. 326, 331, except that respondents employed original *mandamus* instead of prohibition, the Supreme Court of Illinois having no jurisdiction to issue original writs of prohibition. (*People* v. *Circuit Court*, 347 Ill. 34, 40.) It is the practice of the Illinois Supreme Court to issue its original writ of *mandamus* to compel *nisi prius* courts to expunge orders, judgments or decrees entered without jurisdiction. (*People* v. *Niehaus*, 356 Ill. 104, 106, 112, 113, 114; *People* v. *Shurtleff*, 353 Ill. 248, 259, 264; *People* v. *Fisher*, 303 Ill. 430, 434.) Jurisdiction to issue original writs of *mandamus* is expressly conferred upon the Illinois Supreme Court by Article VI, Section 2 of the Illinois Constitution, which provides in part as follows:

> "The Supreme Court shall consist of seven judges and shall have original jurisdiction in cases relating to the revenue, in *mandamus* or *habeas corpus* and appellate jurisdiction in other cases."

Respondents' motion for leave to file the petition was granted by the Illinois Supreme Court and petitions were ordered to answer the petition for the writ (R. 45). This they did by instruments denominated answers (R. 47, 50).

The "answer" of Petersen disclosed a complete lack of understanding of the Illinois practice in original *mandamus* seeking as it did to raise both issues of law and issues of fact (R. 50, *et seq.*). Under settled Illinois practice, a respondent must elect to do one or the other. He cannot do both. (*People* v. *Wells*, 255 Ill. 450, 455, R. 58; *People* v.

Palmer, 363 Ill. 563, 571, R. 59; *People* v. *Lueders*, 287 Ill. 107, 109, R. 60). If he elects to raise an issue of law, he cannot frame issues of fact (*People* v. *Wells*, 255 Ill. 450, 455, R. 58; *People* v. *Palmer*, 356 Ill. 563, 571, R. 59). If he elects to raise an issue of fact he waives a demurrer (*People* v. *Lueders*, 287 Ill. 107, 109, R. 60) and the case is then remanded to a trial court or a Commissioner to determine the facts under a proper application of the law (*People* v. *Mayor of Alton*, 233 Ill. 542, 548). Upon respondents' motion (R. 54) this answer was treated as a demurrer (R. 69) because it sought to raise both issues of law and fact for the reasons assigned in the suggestions filed in support thereof, which are in the record here and need not be amplified (R. 57). Petitioner Petersen's own objections to the motion to treat his answer as a demurrer *agrees that it can be so treated* if the Supreme Court of Illinois would determine the case solely from subdivision II of the original petition for *mandamus* (R. 67) which dealt only with the record in the trial court (R. 9-34), which could not be disputed factually.

After the order had been entered Petersen's counsel wrote the Chief Justice of Illinois inquiring of the reasons impelling the court to grant the motion and the Chief Justice's reply (R. 73) advised him at the same time assuring him that the "issue will be determined solely upon the record, as presented to the trial court", that "obviously, any facts alleged, and not appearing in that record cannot be considered" (R. 73). The opinion of the Supreme Court discloses clearly that only the allegations of Petersen's complaint, admitted to be true, were considered by that court in determining whether the trial court had jurisdiction (R. 96).

Likewise petitioner Miner's answer violated Illinois practice in original *mandamus*. It did not traverse "by distinct and direct denial the facts alleged in the petition upon which the claim of relator is founded" (*People* v. *Lueders*,

287 Ill. 107, 109) nor did it "aver specifically the facts excusing" his conduct (*People* v. *Palmer*, 356 Ill. 563, 569). It merely neither admitted nor denied because of no knowledge sufficient to form a belief (R. 47) which, in legal effect is regarded as an admission that the facts of which lack of knowledge is averred are true (*People* v. *Crabb*, 156 Ill. 155, 165, R. 61, 62). Hence a special demurrer was filed to that answer (R. 67).

Thus the issues were closed upon the original petition for *mandamus*, Petersen's answer treated as a demurrer and the special demurrer to the answer of Miner (R. 69). Thus was presented a pure legal question, whether the facts alleged in Petersen's original complaint, admitting same to be true, brought his suit within the prohibition of the Illinois statute (Sec. 201 of Illinois Insurance Code, *ante* p. 4) prohibiting suits interfering with the prosecution of the business of an insurance company except upon the petition of the Director of Insurance. The Supreme Court of Illinois did not hold "as a matter of fact" that Petersen's suit was one interfering with the business of an insurance company. It held so as a matter of law upon the facts pleaded in his complaint in the trial court which were taken by it as true. Thus the issue was disposed of on demurrer and as agreed to by Petersen (R. 67). Is he thereby denied due process? As to petitioner Miner, how a Supreme Court can deprive one of its trial judges of due process is not readily apparent.

It is somewhat difficult to determine upon which basis petitioners claim to have been denied due process. It seems rather obvious that they disagree with the Illinois court's construction of its statute (Pet. 17, 18, 19) but they do not specifically say they were denied due process because the Illinois court disagreed with them on a matter involving purely local law. Obviously there would be no denial there (*Brinkerhoff-Faris Trust & Sav. Bk.* v.

Hill, 281 U. S. 673, 680, notes 6, 7, and cases cited). They begin the argument with the doctrine that this is a mere derivative suit by a shareholder (Pet. 14), ignoring the fact that it involves insurance. They ignore the right of a state to prescribe the remedy in matters impressed with a public interest. They cite no case holding that the legislature of Illinois, dealing with insurance, a subject impressed with a public interest, could not deprive a stockholder of an insurance corporation from his ordinary derivative action in equity without doing violence to the 14th Amendment. Necessity dictated this course because the authorities are all the other way. No person has any property, in the constitutional sense, in any particular remedy. "All that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure" (Roberts J. in *Gibbs* v. *Zimmerman*, 290 U. S. 326, 332; *Hardware Dealers Mut. F. Ins. Co.* v. *Glidden Co.*, 284 U. S. 151, 158; *New York Central R. Co.* v. *White*, 243 U. S. 188, 207).

The Illinois statute is only one of many restricting a member or members of an insurance company from maintaining class or derivative suits interfering with the prosecution of the business of the company. These statutes broadly prohibit all suits interfering with the prosecution of the business of the company. The Illinois statute, like the others, does not refer specifically "only to actions against an insurance company," as petitioners claim (Pet. 19), but it refers to all suits "interfering with the prosecution of the business of any company," and as construed here, and by the other courts, these statutes apply not only to suits against the company but also against the officers or directors thereof; and, as so construed, they have been held valid by the state courts (see cases cited *infra*, p. 13).

Petitioners suggest that the Illinois Supreme Court issued its writ "upon assumptions of facts not before the

Court" and that therefore t "Court will review and correct errors of fact of a sta Supreme Court in assuming a state of facts, without support in the record" (Pet. 18). Obviously there is basis for the suggestion. The Illinois Supreme Court ld *as a matter of law,* admitting all the facts stated etersen's complaint, that his suit interfered with the p ecution of the Company's business within the meaning the Illinois statute and proscribed by it. Does it ta authority to support the view that a suit which seeks remove the officers and directors of a company interf with the prosecution of its business, not to mention th ancellation of the agency contract under which it procu all of its business or the other relief sought? The ma was disposed of on demurrer and Petersen agreed hat his Answer may be treated as a demurrer" if o the record in the Trial Court were considered (R. 67 nd only that record was considered. It is perfectly o us that the first opinion of the Illinois court was wro nd that a rehearing was necessary if the statute were be observed and its remedial provisions effectuated 83, 84). It is obvious that the first opinion overloo the fact that there was no object in trying the allegati of Petersen's complaint when they were admitted on th ecord.

Ample authority elsewhere pports Illinois' view of the object and purpose of its atute. (*Swan* v. *Mutual Reserve Fund Life Ins. Assn.* 5 N. Y. 9, 49 N. E. 258, 261, 262; *Lowry* v. *State Life* as. Co., 153 Ind. 101, 54 N. E. 442, 443, 444; *Oklahoma* nefit Life Assn. v. *Bird,* (Okla.) 135 Pac. (2d) 994, 99 1943); *Baird* v. *Modern Samaritan,* 162 Minn. 274, 202 W. 498, 499; *Delaney* v. *Ancient Order of United Work* 244 Mass. 556, 138 N. E. 918; *Cook* v. *Illinois Bankers L* Assn., 46 F. (2d) 782, 783 (C.C.A. 7 *McGarry* v. *Lentz* F. (2d) 51, 52 (C.C.A. 6).) Oklahoma issued its ori l writ of prohibition to prevent a similar attempt to ci nvent its law (*Oklahoma*

Benefit Life Assn. v. *Bird,* (Okla.) 135 Pac. (2d) 994, 997 (1943)). Minnesota spoke realistically of the *rationale* behind its similar statute (Sec. 3482, G. S. 1923) in *Baird* v. *Modern Samaritan,* 162 Minn. 274, 202 N. W. 498:

> "Unless dissatisfied members of a fraternal insurance association are able to induce either the insurance commissioner or the Attorney General to move to rectify the conduct of the association or its governing body as to its business or methods, we think they can have no redress through the courts. Good reasons readily suggest themselves for the enactment of section 3482. In associations of this sort every one insured is a member. *If any dissatisfied or disgruntled member on his own motion may drag the association and its governing body into court as to the conduct of its business or methods of procedure, its usefulness will be seriously impaired and its very existence endangered. The mere fact that an action is brought affects the standing of such an association without regard to whether or not any basis exists for so doing.*" (Italics ours.)

Mr. Chief Justice Rugg in *Delaney* v. *Ancient Order of United Workmen,* 244 Mass. 566, 138 N. E. 918, said that the effect of the similar Massachusetts statute was "not to cut off substantial rights, but to provide orderly methods of redressing genuine grievances" and thereby prevent

> "hostile attacks upon an institution in which large numbers of persons are interested, except through the instrumentality of a public officer and to render impossible the harm which might come to a solvent and worthy beneficiary corporation insuring great numbers of people through ill-considered proceedings."

The leading case on this subject is the one mentioned by the Illinois Supreme Court in its Opinion (R. 97) *Swan* v. *Mutual Reserve Fund Life Ins. Assn.,* 155 N. Y. 9, 49 N. E. 258, 261, 262, an opinion by Mr. Justice John Chipman Gray. He spoke of these suits as "suits interfering with the management of corporate affairs, and which might

produce hopeless confusion, and might impair the efficiency of the company, if not wreck it'' (49 N. E. 258, 261).

C.

Petitioner Petersen has failed to exhaust his administrative remedy.

It is, of course, elemental that the business of insurance is impressed with the public interest and therefore subject to the police power of the state. (*German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, 406 *et seq.; National Union Fire Ins. Co.* v. *Wanberg,* 260 U. S. 71, 73; *People* v. *Palmer,* 363 Ill. 499, 508; *Swan* v. *Mut. Reserve Life Ins. Assn.,* 155 N. Y. 9, 49 N. E. 258, 261, 262.) In the exercise of such police power Illinois has and has had for considerable time extensive and exhaustive laws covering the field of insurance (Ill. Rev. Stats (1941 Par. 613, *et seq.*) Ch. 73). Let us first consider the public policy of Illinois as enunciated in its Insurance Code. The Code is a comprehensive one, dealing with insurance companies from their organization to dissolution in all of their important relations either with the state or its citizens. The Director of Insurance is a statutory officer, clothed with all essential authority and power enabling him effectively to enforce the laws governing insurance companies, their directors, officers and agents. A brief examination of the Code shows that the legislature has gone very far under its police power to make certain that insurance companies, domestic, foreign or alien, are properly managed, solvent and fair in their dealings with the public.

The corporate powers of domestic mutual insurance companies such as the Petitioner Association are regulated by Article III of the Code, Section 36, *et seq.* (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 648, *et seq.*). Subsection 2 of Section 40 provides that the corporate powers shall be

exercised by a board of directors which shall have control of its business and affairs. Section 441 contains other general provisions dealing with its general corporate powers (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 1053). Section 142 requires all amendments of the by-laws to be delivered to the Director within thirty days of adoption (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 754). Section 57 (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 669) requires all amendments of the articles of incorporation to be submitted to the Director for his approval. These sections, coupled with subdivision (f) of Section 188 (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 800) referring to rehabilitation and liquidation, give the Director complete power to compel compliance with the law of Illinois as respects the corporate set-up of any company.

There are various other important provisions dealing with such a company as a going concern. Sections 125, 128 and 129 prescribe the investments of such companies (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Pars. 737, 740, 741). Section 53 requires deposit of securities with the state for the protection of the policyholders and creditors (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 665). Section 60 provides the procedure to be followed if the company suffers serious impairment of its assets (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 672). Section 136 requires detailed sworn annual financial statements in order that the Director may determine whether the company is entitled to continue in business (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 748). Sections 187, *et seq.* deal with the method of rehabilitation in case the company is in financial difficulty (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 799). Section 156 provides the method by which a company may merge or consolidate with another company (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 768). Section 173 provides the method by which it may reinsure its risks with other companies (Smith-Hurd Ill.

Rev. Stats. (1941) Ch. 73, Par. 785). Section 144 limits the maximum size of a risk which may be underwritten (Smith-Hurd Ill. Rev. States. (1941) Ch. 73, Par. 756). All of these provisions have to do with the financial solvency of a company.

Section 143, Sections 224, *et seq.* and Sections 355, *et seq.* deal with the forms of policies which may be sold by such companies to the public (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Pars. 755, 836 *et seq.* and 967 *et seq.*). All are required to be approved by the Director before issuance. Section 148 prohibits false advertisements of the financial condition of a company and Section 149 prohibits misrepresentation as to policy contracts (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Pars. 760, 761). The Act approved June 21, 1936, as amended by the Act of July 17, 1941, requires annual licensing by the state of all agents, brokers, solicitors and company service representatives of any such company (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 587 *et seq.*).

In order that the Director may be able to enforce these various provisions, broad powers have been granted him to examine into the books, records and transactions of such companies, including examination of persons having contracts as exclusive general agents. Subsection 1, subdivision (d) of Section 132, Sections 401, 402 and 403, charge the Director with the enforcement of the insurance laws and give him full power so to do. He may conduct such examinations, investigations and hearings as are necessary and proper in the administration of the law. He may appoint deputies and examiners to assist him. He has power to subpoena and examine witnesses (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 1013, *et seq.*). Section 407 (Appendix, *infra*, p. 23) provides that any person having a proper interest, and aggrieved by his action or failure to act, has the right to appeal to the courts for review (Smith-

Hurd Ill. Rev. Stats. (1941) Par. 1019). Section 188 provides the judicial procedure to be followed by the Director in case a company is insolvent, violates the law, is hazardous in its operations, or fails to comply with the lawful orders of the Director (Smith-Hurd Ill. Rev. Stats. (1941) Ch. 73, Par. 800). In such case, he shall report the matter to the Attorney General whose duty it shall be to forthwith apply by petition in the name of the Director to the appropriate circuit or superior court to show cause why the company should not be liquidated or rehabilitated or for such other relief as the nature of the case and the interests of its policyholders, creditors, members, stockholders or the public may require. One of the grounds for such action is (f) *Violation of its charter or any law of this state, or exceeding its corporate powers.* If any company has made a contract in violation of either its charter or the laws of this state, the Director has full authority to make such investigation as he sees fit and to take such legal action in the courts as he thinks appropriate to remedy the evil complained of.

This brings us to a consideration of Section 201. Having in mind that the legislature by the foregoing has laid down the essential conditions governing the companies and has made it the duty of the Diretcor to proceed to correct evils where they exist, it is patent that Section 201 was intended to prevent suits of the kind at bar. We submit that it was intended to protect companies against annoying suits in the courts by policyholders or others as well as to make the Director secure in his administration of the law. If each individual policyholder is to be permitted to bring suits covering matters expressly within the jurisdiction and control of the Director, then, what is the point in enacting detailed regulatory laws and giving the Director authority to enforce them? This legislation, now in force in other states as well as Illinois, is meaningless unless its purpose is to vest in the Director sole author-

ity and power to remedy defects and weaknesses in insurance companies or violations of the law by them. The legislation in no way violates any constitutional right of a policyholder, nor does it impair the obligation of his contract of insurance as the cases hereinbefore referred to clearly demonstrate, but merely furnishes a remedy, an orderly method of procedure, by which that remedy may be applicable to every person situated as is Petitioner Petersen in the case at bar.

The leading case is *Swan* v. *Mutual Reserve Life Ins. Assn.*, 155 N. Y. 9, 49 N. E. 258, written by Mr. Justice John Chipman Gray. In speaking of the New York statute limiting suits, substantially identical with ours, the Court said:

> "The effect of the legislation was not to cut off the rights of a party, but merely to prescribe the form of the remedy which he must avail himself of in the pursuit of his object to compel the corporation to perform acts or to account as to matters in respect of which it may be alleged to have been neglectful or wasteful or mistaken,"

reference being had to application to the Insurance Director.

The Court specifically referred to the fact that the affairs of insurance corporations were peculiarly taken within the care and supervision of the State and that the enactment was within the sound discretion of the legislature "of the possibility of suits interfering with the management of the corporate affairs, and which might produce hopeless confusion, and might impair the efficiency of the company, if not wreck it." This was so because there was a reason for making a distinction "between such insurance companies and other corporations, for the former have characteristics which entitle them to be regarded as almost public in their nature," entirely "unlike private corpora-

tions organized purely for the pecuniary profit of their members."

The learned Justice continued that if his views were not correct, then insurance corporations "chartered by the state as they are for the common benefit of those who wish to cooperate in the business of life insurance, are at the mercy of any member who, with unworthy or dishonest motives, chooses to attack them, and, by threatened interference with their methods or management may compel them to make a settlement with him in order to secure, * * * freedom from troublesome, expensive, unnecessary and wholly disingenuous investigation into affairs and accounts running through many years."

Or as the Supreme Court of Oklahoma, in awarding its original writ of prohibition in a similar case, wherein it was sought to remove the officers of an insurance company, said (*Oklahoma Benefit Life Assn., et al* v. *Baird, et al.*, 135 Pac. (2d) 994:

> "Nor may they (members) resort to the courts for determination whether *the association or its officers* has acted *ultra vires* or *transgressed the law in any way.* The Insurance Commissioner alone may prosecute such cases. He is the executive officer designated for that purpose."
>
> "To so confine legal action to the Insurance Commissioner *has long been considered* as the better plan to preserve and protect the interests of members or policyholders. Insurance companies have come to be looked upon as at least quasi-public in nature, subject to state control for the general benefit of not only the policyholders but of the public." (Italics ours.)

To the same effect are the other foreign cases cited by us under statutes similar to ours.

Petitioner Petersen does not in his complaint allege that he applied to the Director of Insurance to remedy the al-

leged evils of which he complains. The Supreme Court of Illinois, in its opinion here, points out that such remedy is available to him (R. 98). We have seen that constitutionally no one is entitled to a particudar remedy. It is sufficient that an adequate remedy be accorded. It would seem rather obvious that the Insurance Code provides him with an adequate remedy by

(a) Application to the Director to remedy the evils of which he complains, the Director having ample powers under the Code;

(b) Judicial review under Section 407 of the Code (App. *infra*, p. 23) in the event of the failure or refusal of the Director to act.

It is elemental "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted" (Brandeis J., in *Meyers* v. *Bethlehem Ship Building Corp.*, 303 U. S. 41, 50, 51, Note 9, and cases cited.)

CONCLUSION.

For the reason indicated, we therefore respectfully submit that the Petition herein be denied.

Respectfully submitted,

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(Appendix follows)

APPENDIX.

Sec. 407 of Illinois Insurance Code (Ill. Revised Stats. (1943) Ch. 73, Par. 1019).

(COURT REVIEW OF ORDERS AND DECISIONS.) (1) Any order or decision made, issued or executed by the Director, except an order to make good an impairment of capital or surplus or a deficiency in the amount of admitted assets, whereby any company or person is aggrieved, shall be subject to review by the Circuit Court of Sangamon County or the Circuit or Superior Court of the county in which the principal office in this State of the company aggrieved by such order or decision is located, or where the person so aggrieved resides. A petition for the review of the action of the Director shall be filed within thirty days from the date of the service of a copy of the order or decision made by the Director upon such company or person. A copy of such petition for review as filed with and certified to by the Clerk of such Court shall be served upon the Director or in his absence upon some one in active charge of the Department of Insurance within five days after the filing thereof. If such petition for review is not filed within the said thirty days the parties aggrieved shall be deemed to have waived the right to have the merits of the order or decision reviewed and there shall be no trial of the merits thereof by any court to which application may be made by petition or otherwise, to enforce or restrain the enforcement of the same.

(2) The Director shall within ten days, unless the time be extended by order of court, after the service of the copy of the petition for review upon him or his office, prepare

and file with the clerk of the court in which the petition for review was filed, a complete transcript of the record of the hearing, if any, had before him, and a true copy of the order or decision and certify thereto. The order or decision of the Director shall be deemed prima facie to be correct and proper. The cause shall be heard by the said court as a civil case upon such transcript of the record and such additional evidence as may be offered at the hearing of said cause before the court by any of the parties. It shall be the duty of the court to hear and determine such petition with all convenient speed. If on the hearing before the court it shall appear that the record filed by the Director is incomplete, the court may by appropriate order direct the Director to certify any or all parts of the record so omitted.

(3) The court shall have jurisdiction to affirm or to set aside the order or decision of the Director and to restrain the enforcement thereof.

(4) Appeals from all final orders and judgments entered by the Circuit or Superior Courts in reviewing the orders and decisions of the Director may be taken to the Appellate and Supreme Courts of Illinois by any party to the action as in other civil cases.

(5) The commencement of proceedings under this section shall not operate as a stay of the Director's order or decision, unless so ordered by the court.

Office - Supreme Court, U. S.
FEB 3 1945
CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 753

JULIUS H. MINER, as Judge of the Circuit Court of Cook County, and PAUL WILLER PETERSEN,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel., BENEFIT ASSOCIATION OF RAILWAY EMPLOYEES, a mutual insurance corporation, organized and existing under and by virtue of the laws of the State of Illinois, EARL T. DEMOE, ARTHUR J. LINDSLEY, JAMES M. STREET, FRED B. AHARA, ANDREW BLOOMFIELD, W. H. FUNKE, LEE F. WARD and PAUL E. KELLER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

REPLY OF PETITIONERS TO BRIEF OPPOSING CERTIORARI.

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REPLY OF PETITIONERS TO BRIEF OPPOSING CERTIORARI.

ARGUMENT.

A.

The federal question was presented in apt time.

Respondents contend that the Iilinois Court did not decide the federal question involved, with which conten-

tion petitioners are in accord. Respondents further contend that the Illinois Court could properly have ignored the federal question on the theory that it was waived by petitioners, not having been argued but merely mentioned in passing. The record does not support this contention in any respect whatsoever.

Petitioners' answer to respondents' petition for rehearing stated: "It could well be said by respondent Petersen that the granting of a writ of mandamus in this case would be directly contrary to that decision as it would be depriving the stockholders of the corporation of their only remedy for the enforcement of the corporate right to an accounting from these directors, leaving no opportunity to protect it, for the directors themselves will not act," citing *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673 (R. 89). In such answer it was further alleged: "To issue the writ of mandamus would deprive Petersen of his right and remedy in contravention of the Fourteenth Amendment while the refusal to issue the writ could not deprive its directors of due process of law". (R. 91). Such allegation necessarily presented a question under the Federal Constitution in which the "due process" clause is contained in the Fourteenth Amendment and not one under the Illinois Constitution in which the "due process" clause is contained in Section 2 of Article II.

In petitioners' petition for rehearing it was stated: "We do not believe that it was the intent of this Court to produce such a result which denies respondent Petersen a hearing on whether, (conceding that his suit might be within the scope of Section 201) as a matter of fact, its successful prosecution would or would not interfere with the prosecution of the company's business for to do so would be to deprive him of property without due process of law (*Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673)." (R. 113, 114)

From the foregoing quotations it appears that petitioners not only specified the federal question involved and the Constitutional provision relied upon, but the question was argued by petitioners who presented authority in support of their argument. Under such circumstances it should not have been ignored by the Illinois Court, nor can it be contended that that Court would have been required to conduct an independent investigation into the record or the law to find the basis of the federal question or its merit, as was the situation in *Duggan* v. *Ryan*, 211 Ill. 133.

Equally without foundation is the contention that it was waived by petitioners, as was the situation in *Harding* v. *Illinois*, 196 U. S. 78, in which case the state court specially found such waiver to exist.

The rule of law here applicable is that where the state court fails or refuses to pass upon an asserted federal Constitutional right, the case is reviewable by this Court if the state court judgment necessarily denied the federal right asserted. *C. B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 232.

This Court did not hold in *Herndon* v. *Georgia*, 295 U. S. 441, nor has it ever held, that a state court can prevent this Court from determining whether asserted federal rights have been denied a litigant, by ignoring or refusing to pass upon the right asserted. To the contrary, this Court has held (cases cited pages 25, 26 of Petition for Writ of Certiorari) that the Constitution insures to the citizen the privilege of having his rights and immunities judicially declared and protected as well as guaranteeing to him the rights and immunities themselves.

Petitioners believe that their original petition sufficiently states the grounds and the authorities disclosing that the federal question was presented by them in apt time, in view of the prior decisions of the Illinois Court construing

the statute here involved, the construction placed upon it by the opinion of the Illinois Court sought to be reviewed, as a result of which the statute is construed to mean one thing for some cases and another thing for others, and the fact that petitioner Petersen had, initially, invoked a reasonable construction of that statute in his own behalf.

B.

Petitioners were denied due process.

It is admitted by respondents that in the mandamus action before the Illinois Court, the only record before that Court was petitioner Petersen's original complaint filed in the Circuit Court of Cook County (R. 10-16). The Chief Justice of the Supreme Court of Illinois himself stated that that and that alone would be considered by that Court and that that Court had no means for trying issues of fact (R. 72-74). Nevertheless the Illinois Court determined, in that mandamus action, that Petersen's derivative action would interfere with the prosecution of the business of the respondent insurance company.

Respondents argue at length that petitioner Petersen was not denied due process because he was afforded a hearing by the Illinois Supreme Court upon the pleadings, as construed by that Court. Petitioner Petersen's answer to respondents' petition for mandamus set up issues of fact and, specifically, the issue of fact that the prosecution of his derivative action would not interfere with the prosecution of the Association's business (R. 52-53). This answer was treated as a demurrer by that Court and the reasons for that ruling were given in the letter of the Chief Justice (R. 72-74) as being the lack of facilities of the Court to try issues of fact.

Even though it is true that a hearing was granted Petersen in the mandamus suit on the questions of law involved,

he was not permitted to present evidence on the factual question of whether his suit would interfere with the prosecution of the Association's business. This Court has held that even though a trial according to the modes of procedure applicable is afforded, still that is not, in itself, sufficient to afford due process, for the judicial authorities of a state may keep within the letter of the procedural requirements and give the parties the fullest opportunity to be heard (which was not given here) and yet its final action might be such as to be inconsistent with the Fourteenth Amendment. *C. B. & Q. R. R. Co.* v. *Chicago,* 166 U. S. 226, 234, 235.

In its first opinion the Illinois Supreme Court, itself, recognized that under the allegations of petitioner Petersen's complaint it would necessarily be a question of fact as to whether any orders entered, or which could be entered pursuant to his complaint, constituted an interference with the prosecution of the business of the respondent Association (R. 81).

To say that in its second opinion the Illinois Supreme Court found, *as a matter of law,* that *any* relief which could be granted pursuant to that complaint would constitute an interference with the prosecution of the business of the respondent Association is, at best, but a play upon words. Whether the removal of the respondent directors and the election of new ones would interfere with the prosecution of that business any more than would the election of new directors at the expiration of the present term, is a factual question. Whether the sending of notices of a special meeting of members for the election of directors constitutes such interference is likewise a question of fact. It is equally a question of fact whether such interference would result from terminating the contract whereby certain individuals are designated as agents of the corporation, when, in fact, such persons are not licensed to act as agents

and therefore are not legally capable of producing any business whatsoever for the company.

The Illinois Supreme Court, in the mandamus proceeding, determined all those questions by granting the writ of mandamus without affording an opportunity to petitioner Petersen to present evidence on those questions and without itself having any means of determining such issues. Petitioner Petersen was thereby deprived of due process of law, for as this Court has said in *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 304, and in *West Ohio Gas Company* v. *Public Utilities Commission,* 294 U. S. 63, 69, a hearing is not judicial, at least in any adequate sense, unless the evidence can be known and considered. The right to such a hearing is assured to every litigant by the Fourteenth Amendment as a minimal requirement. *West Ohio Gas Co.* v. *Public Utilities Commission,* 294 U. S. 63, 69. *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 682.

But even if it be conceded, solely for purposes of argument, that each and every of the foregoing types of relief which could be granted under Petersen's complaint, would constitute, *as a matter of law,* an interference with the prosecution of the respondent Association's business, still there was within its scope a decree limited to a direction to the individual respondents to account to the Company for the unconscionable payments made to them pursuant to the Agency contract. Could such a decree, so limited, constitute, *as a matter of law,* an interference with the prosecution of the Company's business?

Respondents contend that the Illinois legislature could constitutionally have deprived a member of an insurance company of his derivative action in equity provided that some other effective remedy was provided. With this contention we do not quarrel, but the legislature, in the exercise of its police power, did not see fit to adopt that course. The legislature, in the exercise of that power

and in the public interest, enacted Section 201 of the Illinois Insurance Code (1943 Ill. Rev. Stats. Cha. 73, par. 813) which was restricted to a denial, to members of insurance companies, of the right to have entered by a court, in a suit by them instituted, an order, judgment or decree enjoining, restraining or interfering with the prosecution of the business of their company. The Supreme Court of Illinois by the decision, of which review is here sought, itself extended the scope of that enactment to a prohibition of the *maintenance* of a derivative action by a member of an insurance company, brought for the benefit of that company and against its officers and directors, which decision, in itself, is an exercise of police power by the Court. As will be hereinafter more fully pointed out, such enlargement of the statutory prohibition leaves the Company and its members without a remedy to obtain relief from an inequitable and unconscionable contract with its directors, for the legislature has not granted, nor does any other effective remedy to redress such wrong exist. The Illinois Supreme Court's decision is, therefore, a taking of property without due process in violation of the Fourteenth Amendment. *Gibbes* v. *Zimmerman*, 290 U. S. 326, 332. *Hardward Dealers Mutual Fire Ins. Co.* v. *Glidden*, 284 U. S. 151, 158.

The public policy of other states with respect to actions involving insurance companies is not here involved. The public policy of Illinois is disclosed by the provisions of Section 201 itself. It is further disclosed by the fact that the legislature of Illinois in 1937 narrowed the prohibitions contained in that Section, by eliminating therefrom the prohibition against suits for an accounting (1935 Ill. Rev. Stats. Cha. 73, par. 105 (8) (a)). But if the decisions of other states were relevant, not a single one of those cited by respondents is applicable here, for in every case cited the relief there sought was of a nature which would have prohibited the insurance company there involved from the future conduct of its business or to require an

accounting by the company itself to its policyholders. The relief prayed in petitioner Petersen's suit would in no way prohibit the future conduct of the company's business and was for an accounting to the company by its officers and directors.

The case of *Swan* v. *Mutual Reserve Fund Life Ins. Asso.*, 155 N. Y. 9, 49 N. E. 258, was a suit for an accounting by an insurance company to its members, and was within the precise language of the statute, there involved, forbidding such an action. In Illinois, by virtue of the 1937 amendment, such a suit would be permitted.

In *Lowry* v. *State Life Ins. Co.*, 153 Ind. 101, 54 N. E. 442; *Oklahoma Benefit Life Asso.* v. *Bird*, 135 Pac. 2nd 994; *McGarry* v. *Lentz*, 13 Fed. 2nd 51; *Cook* v. *Illinois Bankers Life Asso.*, 46 Fed. 2nd 782, injunctive relief was sought against the respective defendant companies which would have prohibited them from the future conduct of their business.

In *Delaney* v. *Ancient Order of United Workmen*, 244 Mass. 556, 138 N. E. 918, both an injunction against, and a receiver for the corporation were sought, while in *Baird* v. *Modern Samaritan*, 162 Minn. 274, 202 N. W. 498, the suit was likewise against the corporation, not for its benefit, and the holding in that case, as well as the holding in the *Oklahoma Benefit Life Association* case were precisely to the contrary of the holding of the Illinois Supreme Court in the case, involving almost identical questions, of *Dale* v. *Hancock County Mutual Life Asso.*, 363 Ill. 222.

C.

Petitioner Petersen and the Respondent Insurance Company Have Been Deprived of All Remedies.

Respondents have set out, in great detail, the provisions of the Illinois Insurance Code concerning the powers of the Director of Insurance. They have failed to discover one, for none exists, which affords the Director of Insurance any right or power to require the officers and directors of this Association to account to it for the unconscionable sums received by them.

This Association's directors have been exceedingly clever in their attempt to avoid the statutory prohibition against an officer or director of an insurance company, who receives more than $200.00 a month, receiving any other compensation, directly or indirectly (1935 Ill. Rev. Stats. Cha. 73, par. 382) (originally enacted 1907). The subterfuge adopted was of having the Agency contract provide that the Agency pay the salaries of the Association's President and First and Second Vice Presidents (R. 11) thus hoping to escape the letter, if not the intent of that statute, on the theory that those officers were not receiving any compensation *from the Association itself.*

In 1937 the Insurance Code was enacted by the Illinois legislature and there was, for the first time, granted to the Director of Insurance, the power to examine the books, records and documents of any person having a contract, written or oral, pertaining to the management or control of a company as *exclusive* general agent (1943 Ill. Rev. Stats. Cha. 73, par. 132 (d)). Thereupon, in July 1938, this Association's directors amended the, theretofore, exclusive Agency contract by eliminating from that agreement the provisions designating the Agency as the Association's *exclusive* agent (R. 12) although its members continued to be, in fact, the sole recipients of the 20% of

net premiums (R. 12). The only possible purpose of this contract amendment was to avoid the letter of the Insurance Code in an attempt to deny the Director of Insurance, if he should seek to exercise it, the right to examine the Agency's records, on the theory that no *exclusive* agency contract exists.

Respondents contend (Brief, p. 18) that one of the grounds, upon which the Director of Insurance is authorized to act, is the violation of any law of the State and from that it is argued that if any law were violated by the individual respondents here the members were afforded a remedy by action of the Director of Insurance. The answer to that contention is threefold. First, as above pointed out, these individual respondents have taken every means to avoid a violation of the letter of any law which might empower the Director to act. Second, there is no statute prohibiting an unconscionable contract between the Association and its directors and third, that where, as here, the Director of Insurance has failed to act since 1927 (R. 4) no method or procedure is provided the members by the Insurance Code or otherwise, by which the Director can be required to take action.

Sections 401, 402 and 403 of the Insurance Code (1943 Ill. Rev. Stats. Cha. 73, par. 1013, 1014, 1015) confer upon the Director the power to make rules and regulations, to conduct examinations and investigations and hold hearings and Section 407 (1943 Ill. Rev. Stats. Cha. 73, par. 1019) provides for court review of an order or decision made by the Director. Nowhere is there provided a court proceeding in case of non-action of the Director in failing to exercise the powers conferred upon him.

Therefore, the effect of the Illinois Supreme Court's decision is to render the members of this Association without any remedy for the individual respondents' wrongs, for no statutory remedy is available, either in

their own right or through the Director of Insurance and the remedy of mandamus against the Director of Insurance, to require him to act for their benefit, is not available for the reasons stated in petitioner's Brief, pages 26 and 27 and those herein stated.

CONCLUSION.

For the reasons heretofore indicated we respectfully submit that the petition for certiorari be allowed and the decision of the Supreme Court of Illinois be reviewed by this honorable Court.

Respectfully submitted,

CHARLES AARON,
Counsel for Petitioners.

CHARLES W. STIEFEL, JR.,
Of Counsel.

SUPREME COURT U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 753

JULIUS H. MINER, as Judge of the Circuit Court of Cook County, and PAUL WILLER PETERSEN,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel., BENEFIT ASSOCIATION OF RAILWAY EMPLOYEES, a mutual insurance corporation, organized and existing under and by virtue of the laws of the State of Illinois, EARL T. DEMOE, ARTHUR J. LINDSLEY, JAMES M. STREET, FRED B. AHARA, ANDREW BLOOMFIELD, W. H. FUNKE, LEE F. WARD and PAUL E. KELLER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Petition for Rehearing.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Petition for Rehearing.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully submit that in denying their petition for certiorari this honorable Court has failed to give sufficient consideration to the effect of the decision of which review is sought and the importance of the questions involved.

Incorporated in Illinois alone there are three mutual life insurance companies on a legal reserve basis, twenty-five mutual casualty companies, nine mutual hospital insurance companies, five assessment accident and health insurance companies and twenty-five assessment life insurance companies. In the year ended December 31, 1943 the three mutual reserve life insurance companies had premium income of $7,719,307.13; the twenty-five mutual casualty companies, of $12,536,256.40; the five assessment accident and health companies, of $2,524,303.17 and the twenty-five assessment life insurance companies of $33,771,742.24.

As the policyholders in these mutual companies are widely scattered, a small group is able to perpetuate themselves as officers and directors of the companies through the proxy system. With such means of self perpetuation that small group is able, too frequently, to operate the company for its own selfish interests for the policyholders are at its mercy. The dangers inherent in that condition were pointed out by the Circuit Court of Appeals for the Seventh Circuit, in *Moulton* v. *Field*, 179 Fed. 673, 675 (Cert. Den. 219 U. S. 586) wherein the Court said:

> "Mutual life insurance companies differ radically from ordinary industrial enterprises. Every customer by the act of purchasing what the company has to sell becomes an owner of the business. Because policy holders are necessarily numerous, widely scattered, unacquainted with one another, each owning too small an interest in the business to justify the expense of long travel to the owners' annual meeting, the proxy system seems inevitable. * * If such a self-perpetuating autocracy is not unlawful in its very nature (and if not, it might be well that the taking of proxies in mutual life insurance companies by officers, directors or employees should be prohibited by statute), at least the centering of the electorate and the benefits of the election in one person or group

> of persons raises the highest obligation of good faith and creates the burden of establishing very clearly the fairness and honesty of any challenged benefit."

True, if regulatory statutes are violated the company, itself, is subject to disciplinary action, at the behest of a state's Insurance Department *if that Department sees fit to act.* If, however, the state's officials do not see fit to act, or if the dominating group is able to stay within the letter of the statutes, they are free to serve their own selfish interests without hindrance, unless the courts are open to the policyholders to seek, on behalf of the company, the equitable relief which is granted to stockholders of other companies under like conditions.

In the instant case it is admitted that the Director of Insurance of the State of Illinois has known since 1927 (Rec. 4, 13, 35) of the existence of a contract which the individual respondents caused this insurance company to enter into with themselves, whereby they receive, under the guise of a fictional agency, what in effect are enormous annual gratuities from the company. In fact, the Department's own records disclose that the individual respondents are legally incapable of rendering the service of procuring business for the company, which is the purported basis for the compensation, for neither the Agency, nor any member of it, has been licensed by the Department as an insurance agency, broker, solicitor or agent (R. 13, 14). Despite this knowledge, the Department of Insurance has, during all these years, taken no action to alleviate this condition.

Such failure of the Department to act can be attributed to only two causes; either there existed no violation of statutory provisions which would enable it to act, or there was a disinclination to act despite such violations.

The individual respondents here, as pointed out in petitioners' Reply Brief (pages 9, 10) have not only made every effort to stay within the letter (but not the intent) of the statutes but also have used every means within their power to keep secret from the policy holders and the Department of Insurance the provisions of the Agency contract. Shortly after the State of Illinois enacted the Insurance Code and provided therein that no *exclusive* agency contract may be made unless it is filed with and approved by the Director of Insurance (1943 Ill. Rev. Stats. Cha. 73, Sec. 753), these respondents amended their contract by eliminating the exclusive feature (R. 12) although, in fact, the Agency continued to be the sole recipient of the twenty per cent of net premiums. In this proceeding they refused to comply with an order of court to produce that contract for inspection (R. 25, 26).

If, in fact, management, while not violating the letter of any regulatory statute, nevertheless adopts a policy which is unconscionable and injurious to the policyholders, there should be some forum which is empowered to grant relief. If statutory prohibitions have been violated, but the state official charged with their enforcement has not seen fit to act, and under the law of that state, as here, a writ of mandamus is not available to require him to act, then again there should be a remedy available to the persons injured.

If it be conceded, for purposes of argument, that the Director of Insurance lacks the power to act for lack of any violation of the letter of the statutes, yet the complaint filed herein, the allegations of which must be taken to be true, discloses that a condition requiring redress exists. The effect of the decision of the Supreme Court of Illinois is to deprive the policyholders of all remedy for that condition without a hearing. Such a decision is not in accord with applicable decisions of this Court.

Ohio Bell Telephone Co. v. *Public Utilities Commission,* 301 U. S. 292, 304; *West Ohio Gas Co.* v. *Public Utilities Commission,* 294 U. S. 63, 69; *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 682.

If statute law has been violated, the policyholders are equally remediless as there exists no method of forcing the Department to act. The Illinois Insurance Code provides none and the Illinois decisions hold that mandamus will not lie against the Director. (Petition for Certiorari pages 26, 27).

Respondents have argued at great length that Section 201 of the Illinois Insurance Code Ill. Rev. Statutes (1943), Chap. 73, Sec. 813 enunciates a policy on the part of the State of Illinois to place in the hands of the Director of Insurance, alone, all proceedings, not only against insurance companies but against their officers and directors. In this argument they rely heavily upon the interpretation of a similar New York statute in the case of *Swan* v. *Mutual Reserve Fund Life Ins. Assoc.,* 155 N. Y. 9, 49 N. E. 258.

Not only will a cursory reading of Section 201 of the Illinois Insurance Code disclose that no such policy is thereby enunciated but the New York courts themselves, in a subsequent case, specifically held that the New York statute does not prohibit a suit by a policy holder to recover, for his company, funds wrongfully withdrawn from it by its officers and directors. *Young* v. *Equitable Life Assurance Society of the United States,* 99 N. Y. Supp. 446, 49 Misc. 347; affirmed 98 N. Y. Supp. 1052, 116 App. Div. 911.

In that case the court said, 99 N. Y. Supp. 452:

> "If this suit is successful, all its benefits will go to the corporation, and no burden will be imposed upon it. In reality, the corporation is the plaintiff and its

> directors the defendants. The nominal plaintiff is the mere instigator of the action. The only injunction prayed for is one restraining the commission of waste by the Society's directors. This will not interfere with the Society's business, except to aid it."

That language is precisely applicable to the instant case as the Illinois statute (sec. 201) was taken from the New York statute almost verbatim, except that the New York statute prohibits accounting suits against corporations while the Illinois statute has been amended to eliminate that prohibition. There has not been cited to this Court a single decision in any state, having a similar statute, which prohibits relief in a suit such as petitioner Petersen's.

The decision of the Illinois Supreme Court, of which review is sought, denies due process by determining that an accounting to the company by its officers and directors would, as a matter of law, constitute an interference with the prosecution of the company's business although whether that would be the result is necessarily a question of fact. The result of that decision is also to deprive the policyholders of the Company of every remedy for the continuing wrongs being committed against them by their fiduciaries. Both of these consequences constitute a violation of the Fourteenth Amendment. *Gibbes* v. *Zimmerman*, 290 U. S. 326, 332; *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden*, 284 U. S. 151, 158.

If that decision remains unreversed, those few individuals who control the operations of Illinois mutual insurance companies need but follow the pattern created by the individual respondents here, to be able, unrestrained by the power of any court, to exploit their members and use their funds for their own ends.

The decision of the Illinois Supreme Court is a negation of the elementary rule of law that for every wrong there is a remedy for it is a determination, without a

hearing, that the policyholders, who are the only persons able and willing to seek that remedy, may not have access to the courts to obtain it, a right guaranteed them by the Constitution of the United States.

CONCLUSION.

For the reasons above stated, petitioners respectfully submit that a rehearing be granted and that their petition for certiorari be allowed.

Respectfully submitted,

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CERTIFICATE.

I, Charles W. Stiefel, Jr., one of the attorneys for petitioners in the above cause, hereby certify that the foregoing petition for rehearing is filed in good faith and not for purpose of delay.

CHARLES W. STIEFEL, JR.